

STATE OF MICHIGAN
COURT OF APPEALS

JOHN YOUNG,

Petitioner-Appellee,

v

TOWNSHIP OF GROSSE ILE,

Respondent-Appellant.

UNPUBLISHED

March 23, 2006

No. 247262

Wayne Circuit Court

LC No. 02-232514-AA

Before: Hoekstra, P.J. and Wilder and Zahra, JJ.

PER CURIAM.

This case returns to this Court for adjudication following a remand to the circuit court and to respondent's Zoning Board of Appeals (ZBA). Respondent appeals by leave granted the circuit court's order reversing the ZBA's denial of petitioner's request to place fill material on his property. We affirm the circuit court's decision. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Petitioner owns property adjacent to Frenchman's Creek. From time to time, petitioner experienced flooding in his back yard that prevented him from using the rear portion of the yard and his boat dock. Petitioner conceived a plan to regrade his property by dredging a portion of the creek and placing the dredge spoils and clean fill in his yard, and also installing a French drain. The United States Army Corps of Engineers and the Michigan Department of Environmental Quality (DEQ) approved petitioner's plan. Respondent's Engineer approved the plan on condition that petitioner construct a retaining wall along the northwest lot line and install three French drains which would empty through the existing seawall. The Township Engineer then approved the plan.

Respondent's Township Planning Commission held two public hearings on petitioner's plan. The members of the Planning Commission acknowledged that a problem existed on petitioner's property, but appeared to conclude that the problem could be alleviated by means other than those proposed by petitioner. The Planning Commission approved petitioner's request to dredge the creek, but denied his application to place fill on and grade his property.

Petitioner appealed the Planning Commission's decision to the ZBA. The ZBA upheld the Planning Commission's decision that petitioner could dredge the creek but could not place fill on his property.

Petitioner appealed the ZBA's decision to the circuit court. The circuit court reversed the ZBA's decision without explanation, and entered an order directing the Township to issue a permit authorizing petitioner to fill his property with dredge spoils. The circuit court declined to stay its ruling pending appeal.

Respondent sought leave to appeal the circuit court's order reversing the ZBA's decision. We held the application in abeyance and, while retaining jurisdiction, remanded this matter to the circuit court with instructions that the circuit court articulate the basis for its decision.

In a written opinion, the circuit court set out the basis for its decision. The circuit court concluded that the ZBA's decision to deny petitioner's application based on the presence of the retaining wall was an abuse of discretion given that petitioner had added the wall to his plan at the direction of the Township Engineer, and that other properties featured retaining walls. In addition, the circuit court found that any conclusion that the French drains would not function properly was based on speculation, and thus was not supported by the requisite evidence.

We granted respondent's application. In his brief on appeal, petitioner indicated that the dredge and fill project had been completed. Thereafter, petitioner filed a motion to remand, arguing that in light of new evidence that the project had been successful, a remand for additional factfinding was appropriate. We remanded this case to the circuit court with directions that the circuit court remand the matter to the ZBA for further factfinding and reconsideration in light of the new evidence. We retained jurisdiction.

On remand, the ZBA declined to change its decision. The circuit court determined that because petitioner had completed the project, the case was moot.

A circuit court must review the record and the decision of a ZBA to insure that the decision: (1) complies with the constitution and the laws of the state; (2) is based upon proper procedure; (3) is supported by competent, material, and substantial evidence on the record; and (4) represents the reasonable exercise of discretion granted by law to the ZBA. MCL 125.293a; *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 101; 693 NW2d 170 (2005). Substantial evidence is evidence that a reasoning mind would accept as sufficient to support a conclusion. A court should accord due deference to administrative expertise, and should not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. *Dignan v Michigan Public Schools Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).

We review a lower court's review of an agency decision to determine whether the lower court applied correct legal principles, and whether it misapprehended or grossly misapplied the substantial evidence test to the factual findings made by the agency. This standard is the same as the clearly erroneous standard of review. A finding is clearly erroneous when, after a review of the whole record, we are left with the firm and definite conviction that a mistake was made. *Id.* at 575-576.

Initially, we conclude that the circuit court erred in determining that respondent's appeal of the ZBA's decision was moot in light of the fact that petitioner had completed the dredge and fill project on his property. An issue is moot and ordinarily should not be considered if a court cannot fashion a remedy. *Detroit Edison Co v Public Service Comm*, 264 Mich App 462, 474;

691 NW2d 61 (2004). A party cannot moot an appeal simply by proceeding with a project sought to be enjoined on appeal. See *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 307-308; 633 NW2d 357 (2001). Conceivably, if we concluded that the circuit court erred by reversing the ZBA's decision, we could remand this matter with instructions that petitioner undo the work he performed on his property, although such an order would result in serious practical difficulties. However, for the reasons discussed below, we conclude that the circuit court properly reversed the ZBA's decision.

The undisputed evidence showed that flooding occurred on petitioner's property and occasionally prevented him from using a portion of his back yard and his boat dock. Petitioner filed an application seeking authorization to dredge the creek and fill his property with the dredge spoils to bring the property to the level of that adjacent to it. The plan envisioned the installation of French drains in the existing seawall to allow water to drain from the property into the creek. The Army Corps and the DEQ approved the plan. The Township Engineer required petitioner to add a retaining wall to the proposed project, and then approved it.

The ZBA recognized the problem, and agreed that petitioner was justified in seeking to remedy it. The ZBA denied petitioner's request to place the dredge spoils on his property based in part on the inclusion of the retaining wall, notwithstanding the fact that petitioner had added the wall to the plan at the direction of the Township Engineer in order to gain approval of the plan. The ZBA's decision placed petitioner in the untenable position of complying with the direction of the Township Engineer in order to gain approval of his plan, only to have the plan rejected by the ZBA based in part on the inclusion of a feature deemed necessary by the Township Engineer. The circuit court correctly found that this aspect of the ZBA's decision was arbitrary and capricious, and an abuse of discretion. *Polkton, supra; Dignan, supra*.

In addition, the ZBA based its decision to deny petitioner's request to fill his property on concerns that the French drains would not function properly if the creek rose above the ordinary high water mark. Evidence showed that such an event had occurred in the vicinity of petitioner's property only twice in the past 24 years. Moreover, evidence showed that the Township utilized French drains on its airport property, which was located directly across the creek from petitioner's property. The circuit court correctly found that the ZBA's finding that the French drains might not function correctly was not supported by the requisite evidence. *Polkton, supra*.

The circuit court properly reversed the ZBA's decision. When this case was before it on remand, the circuit court erred by holding that the issue raised by respondent was moot. *Detroit Edison Co, supra*. Nevertheless, we will uphold a circuit court's decision if the circuit court reaches the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra